No. 80-1480

APR 1
CL

IN THE

Supreme Court of the United States

October Term, 1980

RICHARD ROWE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

ARCTIC SLOPE REGIONAL CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

Kevin F. Kelly
WICKWIRE, LEWIS, GOLDMARK & SCHORR
Attorneys for Respondent Arctic Slope Regional Corporation

Office and Post Office Address:
500 Maynard Building
Seattle, Washington 98104
Telephone: (206) 622-9603

CRAFTSMAN PRESS — SEATTLE, WASHINGTON

QUESTION PRESENTED

Did the Secretary of the Interior become contractually bound to execute oil and gas leases to petitioners merely by drawing their lease offers, which were accompanied by a required deposit of one year's rent, at a simultaneous drawing conducted pursuant to the Mineral Leasing Act, although (1) neither the Secretary nor any other government official ever signed any lease or contract for a lease with petitioners, (2) the Secretary gave notice before and at the time of the lease offer drawing that the drawing itself would not necessarily lead to the issuance of leases, and (3) the Secretary returned petitioners' advance rentals to them when he rejected their offers?[i]

(i) In addition to the parties of record, the following companies have an interest in the outcome of the case:

Amoco Production Company
Chevron U.S.A., Inc.
Getty Oil Corporation
Mobil Oil Company
Shell Oil Company
Union Oil Company of California

These companies have interests in oil and gas leases from respondent Arctic Slope Regional Corporation on certain lands to which petitioners' claims relate.

TABLE OF CONTENTS

	Page
Opinions Below	1
Question Presented	1
Statement of the Case	2
A. Factual Background	2
B. Proceedings In the Courts Below	8
Summary of Argument	10
Argument	12
I. The Courts Below Correctly Decided the Case	12
A. The Lower Courts Applied Well-Established Legal Principles in Finding That the Lease Offer Drawing Did Not Restrict the Secretary's Discretion Later to Reject All Lease Applications	12
B. The Lower Courts Correctly Rejected Petitioners' Attempt to Claim That Their Case Is An Exception to These Established Rules	14
II. In Any Event, This Case Does Not Warrant Review By This Court	18
A. There Is No Conflict Among the Circuits	18
B. There Is No Other Reason That Warrants Review by This Court	20
Conclusion	21

TABLES OF AUTHORITY

Table of Cases

Arnold v. Morton, 529 F.2d 1101 (9th Cir. 1976) 12, 13, 15, 20

Burglin v. Morton, 527 F.2d 486 (9th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976) 12, 13, 20

Duesing v. Udall, 350 F.2d 748 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966) 12, 13, 15

Haley v. Seaton, 281 F.2d 620 (D.C. Cir. 1960) 12, 13

McDade v. Morton, 353 F. Supp. 1006 (D.D.C. 1973), *aff'd*, 494 F.2d 1156 (D.C. Cir. 1974) 12, 17, 20

McTiernan v. Franklin, 508 F.2d 885 (10th Cir. 1975) .. 12

Page

Pease v. Udall, 332 F.2d 62 (9th Cir. 1964) 12

Rowe v. Kleppe,
Civ. No. 75-1152 (D.D.C. July 30, 1976) 12

Rowe v. United States,
464 F. Supp. 1060 (D. Alas. 1979) 12, 13, 17

Schraier v. Hickel,
419 F.2d 663 (D.C. Cir. 1969) 13, 14, 15, 20

Superior Oil Co. v. Udall,
409 F.2d 1115 (D.C. Cir. 1969) 17, 18, 19, 20

Udall v. Tallman, 380 U.S. 1 (1965) 12, 13, 14

United States ex rel. McLennan v. Wilbur,
283 U.S. 414 (1930) 12

Statutes

30 U.S.C. § 226(c), Mineral Leasing Act of 1970
§ 17(c) 12

30 U.S.C. § 226-2 20

43 U.S.C. §§ 1601-27, Alaska Native Claims Settlement
Act 2, 7

43 U.S.C. § 1610(a)(1) 7

43 U.S.C. § 1610(a)(3) 7

Textbooks

Restatement (Second) of Contracts § 24A (Tent. Drafts
Nos. 1-7 (1973) 16

Other Authority

43 C.F.R. § 3123.5(b) (1966) 3, 4, 17

31 Fed. Reg. 12575 (Sept. 23, 1966) 4

31 Fed. Reg. 15494 (Dec. 8, 1966) 6

34 Fed. Reg. 1025 (Jan 22, 1969) 7

37 Fed. Reg. 5572 (March 16, 1972) 7

37 Fed. Reg. 18916 (Sept. 16, 1972) 7-8

38 Fed. Reg. 26376 (Sept. 20, 1973) 8

41 Fed. Reg. 36672 (Aug. 31, 1976) 8

41 Fed. Reg. 4193 (Sept. 17, 1976) 8

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1480

RICHARD ROWE, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

ARCTIC SLOPE REGIONAL CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-11) is reported at 633 F.2d 799 (9th Cir. 1980).[1] The opinion of the district court (Pet. App. A-12 to A-76) is reported at 464 F. Supp. 1060 (D. Alas. 1979).

QUESTION PRESENTED

Did the Secretary of the Interior become contractually bound to execute oil and gas leases to petitioners merely

1. The first paragraph of what purports to be the Ninth Circuit's opinion in Petitioners' Appendix (Pet. App. A-1) is a typographical error and has nothing to do with this case. The Ninth Circuit's opinion begins on A-2 of Petitioners' Appendix.

by drawing their lease offers, which were accompanied by a required deposit of one year's rent, at a simultaneous drawing conducted pursuant to the Mineral Leasing Act, although (1) neither the Secretary nor any other government official ever signed any lease or contract for a lease with petitioners, (2) the Secretary gave notice before and at the time of the lease offer drawing that the drawing itself would not necessarily lead to the issuance of leases, and (3) the Secretary returned petitioners' advance rentals to them when he rejected their offers?[2]

STATEMENT OF THE CASE

A. Factual Background

Respondent Arctic Slope Regional Corporation ("ASRC"), a Native corporation created pursuant to express provisions of the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. §§ 1601-27, holds legal title to land on which petitioners seek federal oil and gas leases. Petitioners filed their lease applications in 1966, when the land was still in federal ownership. In 1976, pursuant to the terms of ANCSA, the Secretary of the Interior rejected their lease applications and conveyed title to the land, including subsurface rights, to ASRC.

---

2. In addition to the parties of record, the following companies have an interest in the outcome of the case:

Amoco Production Company
Chevron U.S.A., Inc.
Getty Oil Corporation
Mobil Oil Company
Shell Oil Company
Union Oil Company of California

These companies have interests in oil and gas leases from respondent Arctic Slope Regional Corporation on certain lands to which petitioners' claims relate.

Petitioners here seek a court order compelling the Secretary to issue oil and gas leases on ASRC's land. (Pet. 4.) Petitioners are also, at this time, pursuing a claim for damages for breach of contract against the United States in the Court of Claims.

The factual background relevant to this case is as follows:

Two procedures exist for the noncompetitive leasing of federal lands under the Mineral Leasing Act. Under the first, called "simultaneous filing," lease applicants file offers pursuant to a notice from the Secretary that lands are available for leasing. All offers filed by a specified date are deemed to be simultaneously filed. The Secretary then holds a drawing to determine which lease offeror will become the first-qualified applicant or offeror for a particular lease *if* the Secretary later decides, in his discretion, to issue leases for the land involved. This procedure thus avoids a "race to the counter" to determine priorities among lease applicants. Petitioners' applications were of this type.

The second noncompetitive leasing procedure, followed by petitioners' co-plaintiffs in the district court, simply involves the filing of "over-the-counter" lease offers in the designated office of the Bureau of Land Management. This method does involve a "race to the counter," and the first-qualified applicant to file an offer has priority for a lease as against other lease applicants if the Secretary decides to issue a lease.

Both procedures are governed, and were governed at the time relevant to this case, by a regulation of the Department of the Interior that specifies how the United States indicates its acceptance of a lease offer and the issuance of a lease. 43 C.F.R. § 3123.5(b) (1966) provided:

> The United States will indicate its acceptance of the lease offer, in whole or in part, and the issuance of the lease *by the signature of the appropriate officer thereof in the space provided.*

(Emphasis added.)

Petitioners filed their lease applications in 1966 following a notice published by the Secretary inviting lease applications for specified lands on Alaska's North Slope. 31 Fed. Reg. 12575 (Sept. 23, 1966). That notice provided that the Secretary would treat lease offers filed on or before November 18, 1966, as "simultaneous" filings. The notice required applicants to submit their offers on a special form and to include a $10 filing fee *and* the first year's advance rental as part of their offer. According to the notice, this advance rental was returnable if an applicant withdrew his offer prior to the date of the drawing, which was to be December 20, 1966, or if the Secretary rejected offers during or after the drawing. If an applicant became a "successful drawee" for a particular block of land, however, the applicant became bound to enter into a lease "if such a lease [were] issued to him as a result of the drawing." *See* 464 F. Supp. at 1065 n.24 (Pet. App. A-53).

The applicant's contingent obligation and the requirement of an advance deposit were special provisions developed by the Secretary to alleviate problems caused by lease applicant-speculators who had been abusing prior leasing procedures. As the district court explained:

> The Secretary's purpose in changing the last three opening notices in respect to the non-returnability of the first-year's rental was solely to prevent an obstructive practice of certain applicants who would withdraw their first-drawn offers, after the drawing but prior to lease issuance, if they were unsuccessful in bartering their lease priority. Under prior practice

> speculators could file offers on numerous blocks of land, tendering the nominal $10.00 filing fee per offer. If any of the offers became "first-drawn" offers following the drawing, the speculators would seek to sell those offers to a third party, for a profit. If a lease could not ultimately be sold, the first-drawn offer was withdrawn before any leases were executed. The non-withdrawal provision for advance payment of the first-year's rental was a remedial measure designed to discourage such speculation (and the resulting obstructive effect on the Bureau office) and to require offerors, as defendants so aptly state, to "cover their bets."

464 F. Supp. at 1078 (Pet. App. A-44 to A-45).

The Secretary, on the other hand, was obligated to lease only to "successful drawees" *if* the Secretary later decided to lease to anyone.

On November 28, 1966, in response to considerable pressure from Alaska Native groups protesting the potential leasing of lands to which they asserted claims of aboriginal title, the Anchorage office of the Bureau of Land Management issued a press release stating that "[t]he Department of Interior, Bureau of Land Management will hold the North Slope oil and gas lease drawing on December 20, 1966, but will not issue any leases resulting from the drawing." The press release stated that the drawing "will be held to determine *priorities*," but that "no final action will be taken on any applications" until Native protests were resolved. (Emphasis added.) *See* 464 F. Supp. at 1067 (Pet. App. A-19 to A-20).

On November 30, 1966, the Anchorage Land Office posted a public notice confirming that the Secretary had issued instructions to hold the lease offer drawing as scheduled on December 20, 1966, "to determine successful *drawees* among the *offerors*, but to postpone issuance of the

leases until the question of the aboriginal claim is further considered." 464 F. Supp. 1067 (Pet. App. A-20) (emphasis added). That notice concluded with the following paragraph:

> Upon determination of the successful drawee for each leasing block the first year's rental will not be returnable, *unless the offer is rejected.* At this time there is no estimate as to *when* or *if* the leases will be issued.

464 F. Supp. at 1067 (Pet. App. A-20) (emphasis added). On November 30, 1966, a similar notice was posted in the Department's Fairbanks Land Office and published the next day in the local newspaper. 464 F. Supp. at 1067 (Pet. App. A-21). On December 1, 1966, the Secretary filed a similar public notice with the Office of the Federal Register announcing the suspension of any lease issuance pending the consideration of the Native protests, but stating that "drawings will proceed as indicated in the notice published September 23, 1966." 31 Fed. Reg. 15494 (Dec. 8, 1966), 464 F. Supp. at 1067 (Pet. App. A-21). Finally, the federal officials who conducted the drawing on December 20 made a similar announcement orally before the drawing began.

Thus, on several occasions prior to the lease offer drawing, the Secretary put petitioners on notice that although the drawing would be conducted, it would not necessarily lead to the issuance of leases. Applicants were free at any time prior to the drawing to withdraw their offers and obtain the return of their advance rentals. Hundreds of lease offerors withdrew their offers and recovered their advance rentals. *See* 464 F. Supp. at 1067 and n. 40 (Pet. App. A-21 to A-22). Hundreds more left their offers on file, however, gambling that the Native protests would be resolved in

such a way that the Secretary still might issue leases to them in the future. Petitioners left their offers on file.

On December 20, 1966, the Department of the Interior held the lease offer drawing as scheduled, and petitioners claim to be among those whose offers were drawn. No lease was ever executed as a result of that drawing.

During this same period of time, sentiment was rising in Alaska and in Congress for resolution of long-standing controversies surrounding Native land claims in Alaska. In late 1966 the Secretary suspended the issuance of mineral leases in Alaska until Congress resolved the controversy. On January 17, 1969, the Secretary issued P.L.O. 4582 (34 Fed. Reg. 1025, Jan. 22, 1969), which formally withdrew all public lands in Alaska from mineral leasing "for the determination and protection of the rights of the Native Aleuts, Eskimos and Indians of Alaska."

After years of intense consideration of this complex issue, Congress, on December 18, 1971, enacted the Alaska Native Claims Settlement Act ("ANCSA"), codified at 43 U.S.C. §§ 1601-27. ANCSA guaranteed Alaska's Natives the right to select 40 million acres of land, including both surface and subsurface rights, and set forth a complicated formula for determining public lands subject to Native selection rights. 43 U.S.C. § 1610(a)(1) and (a)(3).

The Act explicitly authorized the withdrawal of land for selections by respondent Arctic Slope Regional Corporation, thereby insulating that land from all forms of appropriation under the public land laws. The Secretary formally withdrew the necessary land for ASRC's selections by issuing P.L.O. 5169 (37 Fed. Reg. 5572, March 16, 1972), which order was modified by P.L.O. 5256 (37 Fed. Reg.

18916, Sept. 16, 1972) and P.L.O. 5396 (38 Fed. Reg. 26376, Sept. 20, 1973). Thereafter, ASRC selected the land to which it was entitled from those withdrawals, and, on August 31 and September 17, 1976, the Bureau of Land Management published decisions approving the conveyance of those selected lands to ASRC, as required by ANCSA. *See* 41 Fed. Reg. 36672 (Aug. 31, 1976) and 41 Fed. Reg. 4193 (Sept. 17, 1976).

Petitioners filed administrative appeals before the Alaska Native Claims Appeal Board ("ANCAB") challenging the Department's proposed conveyances to ASRC and demanding that the Department issue leases to them. In a lengthy decision dated November 24, 1976, the Secretary dismissed petitioners' appeals and rejected petitioners' lease applications. *In re Arctic Slope/Western*, ANCAB No. RLS 76-11(A)-(MM) and *In re Arctic Slope/Eastern (Central)*, ANCAB No. RLS 76-12(A)-(O), (Pet. App. A-77 to A-97). As required, the Secretary then tendered all of petitioners' advance rentals to them. (Pet. 10).

On November 29, 1976, the United States conveyed legal title of the lands in question to ASRC. This lawsuit followed.

B. Proceedings in the Courts Below

Petitioners, and a companion group of plaintiffs (the *Rowlett* plaintiffs) whose case was consolidated with petitioners' case in the district court, raised numerous claims in that court. They claimed that their lease applications gave them a "priority right" over the Arctic Slope Regional Corporation to the lands in question, and that their applications constituted "valid existing rights" to which the conveyances to ASRC were subject. They raised several claims

challenging the manner in which the Secretary considered and rejected their applications and the factors that influenced his decision. They also challenged the manner in which the Secretary determined the lands that ASRC was eligible to select under ANCSA. Finally, petitioners claimed that they had a contractual right to leases from the Secretary based solely on the fact that their lease offers were drawn from among other lease offers simultaneously filed on December 20, 1966.

In an exhaustive opinion on the legal status of applicants for noncompetitive federal oil and gas leases, the district court considered and rejected each of petitioners' claims. 464 F. Supp. 1060. The district court held, *inter alia*, that petitioners had no legal claims, by contract or otherwise, as a result of their lease applications, and that their deposit of advance rentals did not alter that fact. The district court reviewed all of the public notices related to this lease offering and found "nothing in any of the notices or the regulations, to support plaintiffs' reading." 464 F. Supp. at 1079 (Pet. App. A-46 to A-47). The court concluded that the United States could not indicate its acceptance of petitioners' lease offers in any manner other than by the signature of the appropriate officer on the lease form, which acceptance never occurred. 464 F. Supp. at 1079 (Pet. App. A-47). The district court also upheld in all respects the manner in which the Secretary processed petitioners' lease applications.

On appeal to the Ninth Circuit, petitioners abandoned all of their many claims except the claim that the simultaneous drawing had given them a contract right to issuance of a lease. Their companion plaintiffs chose not to

appeal at all. The Ninth Circuit affirmed the district court on the merits:

> Turning to the merits, we agree with the district court that the plaintiffs failed to establish any right to the leases they sought, by contract, statute, or otherwise. We affirm the grant of summary judgment for the defendants on this issue for the reasons stated in the district court's opinion.

633 F.2d at 802-03 (Pet. App. A-9).

The Ninth Circuit concluded, however, that the district court lacked jurisdiction even to entertain petitioners' claim for breach of contract damages against the United States because the Court of Claims had exclusive jurisdiction over that claim. On that issue alone, therefore, the Ninth Circuit reversed and remanded the case with directions that the district court either dismiss petitioners' damage claim for lack of jurisdiction or, in its discretion, transfer that claim to the Court of Claims. 633 F.2d at 802 (Pet. App. A-8).

On February 27, 1981, having already petitioned this Court for a writ of certiorari to the Ninth Circuit, petitioners moved the district court for an order transferring their damage claim to the Court of Claims.

The sole issue petitioners raise in their petition relates to their claim that they are contractually entitled to the issuance of oil and gas leases by the Secretary.

SUMMARY OF ARGUMENT

The principal issue in this case is not, as petitioners suggest, whether the United States Government can "accept as earned, and then spend and refuse to return, advance rentals tendered for oil and gas leases on public lands, yet have no obligation to issue those leases." (Pet. i.) Rather,

the issue is whether the Secretary of the Interior became contractually obligated to execute oil and gas leases to petitioners merely by drawing their lease offers at a simultaneous lease offer drawing, when the Secretary gave notice that a special deposit would be required that would be held until the Secretary determined whether to issue leases, where neither the Secretary nor any other government official ever signed any lease or contract for a lease with petitioners, and where the Secretary refunded petitioners' deposit after determining that no lease whatsoever would be issued to any person as a result of the lease drawing.

The courts below, applying principles of law well established in this Court and the United States Courts of Appeals for the Ninth Circuit, the District of Columbia Circuit and other circuits, correctly decided that the petitioners failed to establish any right to the leases they seek, by contract, statute or otherwise. The three well-established principles of law that compelled this conclusion are: (1) the Secretary has broad discretion in the area of mineral leasing and can refuse to issue any lease at all on a given tract; (2) a mere application for a lease vests no rights in the applicant; and (3) the Secretary's construction of his own administrative regulations relating to the issuance of mineral leases is entitled to great deference. Further, as the courts explicitly found, the regulations governing the lease drawings made clear that petitioners would not receive any contractual right to issuance of a lease unless and until the appropriate government official signed the appropriate lease form, which never occurred here.

In any event, the issue in this case, which depends upon the application of the specific and unique facts of this case to undisputed, well-established principles of law and

which involves no conflicts among the circuits, does not warrant review by this Court.

ARGUMENT

I. The Courts Below Correctly Decided The Case.

A. *The Lower Courts Applied Well-Established Legal Principles in Finding That the Lease Offer Drawing Did Not Restrict the Secretary's Discretion Later to Reject All Lease Applications.*

Three principles of law well-established in this Court and the courts of appeals and district courts coalesced in this case to compel the result reached by the lower courts.

First, it is well established that the Secretary has broad discretion in the area of mineral leasing, including the discretion to refuse to issue any leases at all. Although Section 17(c) of the Mineral Leasing Act of 1920, 30 U.S.C. § 226(c), required the Secretary to issue leases to the first qualified applicants *if* the Secretary decided to issue any leases at all, the Act "left the Secretary discretion to refuse to issue any lease at all on a given tract." *Udall v. Tallman*, 380 U.S. 1, 4 (1965). "It is quite evident that the Secretary has no obligation to issue any lease on public lands." *Arnold v. Morton*, 529 F.2d 1101, 1105 (9th Cir. 1976).[3]

3. *United States ex rel. McLennan v. Wilbur*, 283 U.S. 414, 418-19 (1930); *Burglin v. Morton*, 527 F.2d 486, 488 (9th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976); *Arnold v. Morton*, 529 F.2d 1101, 1105, (9th Cir. 1976); *McTiernan v. Franklin*, 508 F.2d 885, 887 (10th Cir. 1975); *Duesing v. Udall*, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966); *Pease v. Udall*, 332 F.2d 62, 63 (9th Cir. 1964); *Haley v. Seaton*, 281 F.2d 620, 623-24 (D.C. Cir. 1960); *Rowe v. United States*, 464 F. Supp. 1060, 1070 (D. Alas. 1979); *Rowe v. Kleppe*, Civ. No. 75-1152 at 4-5 (D.D.C. July 30, 1976); *McDade v. Morton*, 353 F. Supp. 1006, 1010 (D.D.C. 1973), *aff'd*, 494 F.2d 1156 (D.C. Cir. 1974).

The second and related established principle of law governing this case is that "[a] mere application for a lease vests no rights in the applicant." *Arnold v. Morton*, 529 F.2d 1101, 1106 (9th Cir. 1976). The drawing of an offer from among others simultaneously filed only serves to establish priorities *among competing lease applicants*, and in no way reduces the discretion of the Secretary to refuse to issue any lease at all.[4]

Petitioners' attempt to concoct a conflict between the Ninth Circuit and the District of Columbia Circuit is misguided. Those circuits have consistently applied the same rule on this issue:

> [E]ven where an application for a lease is both first in time and filed in response to a government notice that it will receive offers, no legal claim against the Government arises.

Arnold v. Morton, 529 F.2d 1101, 1106 (9th Cir. 1976), *and cases cited therein.*

> The filing of an application which has not been accepted does not give any right to a lease, or generate a legal interest which reduces or restricts the discretion vested in the Secretary whether or not to issue leases for the lands involved.

Duesing v. Udall, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966).

Indeed, the opinion of the Court of Appeals for the District of Columbia Circuit in *Schraier v. Hickel*, 419 F.2d 663 (D.C. Cir. 1969), upon which the district court in

---

4. *Burglin v. Morton*, 527 F.2d 486, 488 n.2 (9th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976); *Duesing v. Udall*, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966); *Schraier v. Hickel*, 419 F.2d 663, 666 (D.C. Cir. 1969); *Haley v. Seaton*, 281 F.2d 620, 623-24 (D.C. Cir. 1960); *Rowe v. United States*, 464 F. Supp. 1060, 1070 (D. Alas. 1979); *see Udall v. Tallman*, 380 U.S. 1, 4 (1965).

this case relied and which is cited with approval in numerous opinions of the Ninth Circuit, the District of Columbia Circuit and other circuits, puts petitioners' status clearly in perspective.

> The fact that the Bureau published a notice that it would receive offers to lease did not preclude a later exercise of discretion to decline to lease. *An application for a lease,* even though first in time or *drawn by lot from among simultaneous offers, is a hope, or perhaps expectation, rather than a claim.*

419 F.2d at 666. Like the unsuccessful plaintiffs in *Schraier v. Hickel,* the petitioners here have only hopes, or perhaps expectations, but no bona fide claims.

The third well-established principle of law applicable here is that when the construction of an administrative regulation is at issue, the interpretation given that regulation by the officers or agency charged with its administration must be shown great deference. *Udall v. Tallman,* 380 U.S. 1, 16 (1965), *and cases cited therein.* Here, the Secretary interpreted departmental regulations as providing that a decision to issue a lease and the issuance of a lease could be effected only by the signature of an appropriate government official on the appropriate form. No such signature occurred here.

B. *The Lower Courts Correctly Rejected Petitioners' Attempt to Claim That Their Case Is An Exception to These Established Rules.*

Petitioners attempt to circumvent these well-established principles of law by arguing that the Secretary must have become bound to issue leases to them at the same time that petitioners became bound to pay their first year's rent: at the time of the drawing on December 20, 1966. (Pet. 17.) This contention is without factual or legal foundation. As

discussed above, the fact that petitioners' lease applications may have been drawn from among others deemed simultaneously filed on December 20, 1966, in no way vested petitioners with any legal claim against the Secretary and did not diminish or restrict the discretion vested in the Secretary to refuse to issue any leases at all. *Arnold v. Morton*, 529 F.2d 1101, 1106 (9th Cir. 1976), *and cases cited therein; Duesing v. Udall*, 350 F.2d 748, 750-51 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 912 (1966); *Schraier v. Hickel*, 419 F.2d 663, 666 (D.C. Cir. 1969).

Similarly, the fact that the Secretary required lease applicants to deposit the first year's rental in advance as part of their application procedure did not in any way restrict or reduce the Secretary's discretion later to refuse to issue a lease to the lease applicants. As discussed above and in the district court's opinion, the Secretary's purpose in requiring an advance rental deposit was to discourage speculation that was having an obstructive effect on the Department's administration of the leasing program. 464 F. Supp. at 1078 (Pet. App. A-44 to A-45.) The requirement that the first year's rentals were not returnable unless and until the Secretary rejected the lease applications in no way altered the established policy and requirements of law that lease acceptance remained in the full discretion of the Secretary up until the time that the Secretary exercised the discretion to issue leases and a designated government official formally executed leases in favor of selected applicants. As the district court explained:

> The non-returnability of the first-year's rental had been announced in the September, 1966 opening notice as one of the filing requirements necessary for an offer to be eligible for the drawing. Plaintiffs argue that while not explicitly stated in the notice, this pro-

vision for non-returnability indicated that the Department agreed to be bound to issuance of leases to successful drawees. I disagree.

The opening notice published in the Federal Register made it abundantly clear that the filing of an application constituted an "offer to lease," and that the applicant agreed he would be bound to a lease "if such a lease is issued to him as a result of the drawing." Nowhere in the notice is there mention that the non-returnability provision altered the Secretary's traditional discretion over whether or not to lease.

. . . .

The documents uniformly reveal a singular Bureau intent in the notices to provide for a non-returnability policy that would be consistent with the regulations in existence at the time; particular accounting procedures were never intended to add more to this limited goal. There is no support anywhere for plaintiffs' theory that paragraph 3(d) of the notice was somehow also intended to alter the established policy and requirements of law that lease acceptance remain within the full discretion of the Secretary up until a designated government official had executed leases in favor of priority-holding applicants.

464 F. Supp. at 1078-79 (Pet. App. A-43 to A-45).[5]

5. While the district court correctly found it "unnecessary to pigeonhole the leasing procedure here employed into a recognized form of contract," the court properly found the procedure employed in this lease offering analogous to an option contract or an irrevocable offer. 464 F. Supp. at 1080 n. 102 (inadvertently omitted from Petitioners' Appendix). When petitioners chose to make lease offers, they did so on the basis of conditions set forth in the Secretary's September opening notice. Those conditions included the payment of a $10 filing fee, deposit of the first year's advance rental, and a promise that each offer would be irrevocable after the December 20 drawing. In exchange for these deposits and a promise of irrevocability, the Secretary promised to issue a lease to the offerors whose names were drawn on December 20 *if* he decided to lease to anyone. The legal relationship between the Secretary and successful drawees was a valid option contract (or an irrevocable offer) in the classic sense. *See* Restatement (Second) of Contracts § 24A (Tent. Drafts Nos. 1-7, 1973), and accompanying comments and illustrations. While the Secretary had the option to lease or not to lease, his promise to lease to successful drawees *if* he issued any

A departmental regulation in force at the time of this lease offer drawing, 43 C.F.R. Section 3123.5(b), expressly provided that the United States would indicate its acceptance of a lease offer by the exclusive method of the appropriate government official's signature on the lease form. "No other manner has been provided, or recognized by any court, for the United States to indicate its acceptance of an oil or gas lease offer." *McDade v. Morton*, 353 F. Supp. 1006, 1010 (D.D.C. 1973), *affirmed*, 494 F.2d 1156 (D.C. Cir. 1974); *Rowe v. United States*, *supra*, 464 F. Supp. at 1079 n. 98. The petitioners had abundant notice that, despite their deposit of an advance rental, the mere drawing of their lease offers at the December 20 drawing would not itself constitute the Secretary's acceptance of those lease offers, and that implementation of this regulation would be the only method by which the Secretary would indicate his acceptance of the lease offers.

Moreover, the Secretary interpreted the applicable regulations in this fashion. The lower courts properly gave great deference to the Secretary's interpretation of his own regulations. As the district court stated:

> Under the two leading cases of the Supreme Court discussed earlier [citations omitted], I am required to uphold the decision of the Secretary if I find that its reasoning and its interpretation of its own regulations contain the "power to persuade." Indeed, I find that the Secretary's decision interpreting paragraph (c) of

---

leases at all was sufficient consideration to bind petitioners to their irrevocable offer. *Id.* § 2, Comment e, Illustration 3; *id.* § 78, Comment d, Illustration 8.

In any event, even if this procedure did conflict with common law contract principles, which it did not, the statutory and regulatory requirements of the Mineral Leasing Act would prevail over general contract principles. *Superior Oil Co. v. Udall*, 409 F.2d 1115, 1121 (D.C. Cir. 1969).

> the September notice as a narrow provision designed solely to reduce lease brokering is a reasonable, if not the only interpretation consistent with the Department's prior procedure in oil and gas leasing programs. I further find that the statutory mandate of the Mineral Act is not impeded, and indeed is buttressed by the retention of discretion to lease until the moment at which leasing occurs through execution. The Secretary's decision regarding the manner of acceptance is therefore affirmed.

464 F. Supp. at 1080 (the last page of the district court's opinion was omitted, apparently inadvertently, from Petitioners' Appendix).

In sum, the lower courts correctly applied three well-established and undisputed principles of law to the specific facts of this case. The Secretary rejected petitioners' lease applications and returned their advance rentals. The lower courts properly concluded that petitioners' claims against respondents are without merit.

II. In Any Event, This Case Does Not Warrant Review By This Court.

A. *There Is No Conflict Among the Circuits.*

There is not, as petitioners contend, any conflict between the positions of the Courts of Appeals for the Ninth Circuit and the District of Columbia Circuit on the Secretary's acceptance of oil and gas lease offers. *See* Part I(A), *supra.* Petitioners' reliance upon *Superior Oil Co. v. Udall,* 409 F.2d 1115 (D.C. Cir. 1969), is misplaced. That case is readily distinguishable on the facts from this case. *Superior Oil* involved a competitive bidding situation where the Secretary had exercised his discretion to issue a lease, but tried to issue it to other than the first qualified applicant. The court held that where the Secretary decides to issue

a lease, the first qualified applicant has a right to receive the lease that is issued. The court did not hold that the Secretary was stripped of his established right to reject all lease applications. In the present case, the Secretary rejected all lease applications as, indeed, he was required to do by the terms of the Alaska Native Claims Settlement Act. Nothing in *Superior Oil* suggests that the Secretary did not have this power.

To the extent that *Superior Oil* is applicable at all, it undercuts rather than supports petitioners' position. Petitioners characterize this case as "a contract action under federal common law." (Pet. 4.) The court in *Superior Oil* made clear that, to the extent common law contract principles conflict with the requirements of the Mineral Leasing Act and the regulations issued thereunder, the statute and regulations must prevail:

> General rules of Government contract law must give way to the specific regulations and Notice of Sale governing this kind of transaction in the same way that common law contract principles must yield to the extent that they are inconsistent with governing regulations.

409 F.2d at 1121. The *Superior Oil* court also emphasized the need for "careful procedures" and "precision, care and certainty" in the administration of mineral leases. 409 F.2d at 1119.

The decisions of the lower courts in this case are entirely consistent with both of those principles espoused in *Superior Oil*. The lower courts correctly interpreted the departmental regulation requiring the signature of the appropriate government official as specifying the exclusive method for indicating lease offer acceptance, despite pe-

titioners' arguments to the contrary based on their own interpretation of principles of general contract law. In addition, the decisions of the lower courts were necessary to maintain the requisite degree of "precision, care and certainty" in the administration of mineral leases. The applicable regulations and general principles of contract law both require that the United States indicate in a written, signed document its intent to issue leases. This requirement promotes "precision, care and certainty" in lease issuance.

Furthermore, decisions of the District of Columbia Circuit since *Superior Oil* involving federal mineral leasing are entirely consistent with, and are frequently cited with approval in, decisions of the Ninth Circuit on the same subject. *See, e.g., Schraier v. Hickel,* 419 F.2d 663 (D.C. Cir. 1969); *McDade v. Morton,* 353 F. Supp. 1006 (D.D.C. 1973), *affirmed,* 494 F.2d 1156 (D.C. Cir. 1974); *Arnold v. Morton,* 529 F.2d 1101 (9th Cir. 1976); *Burglin v. Morton,* 527 F.2d 486 (9th Cir. 1975), *cert. denied,* 425 U.S. 973 (1976).

The asserted conflict between the Ninth Circuit and the District of Columbia Circuit is illusory.

B. *There Is No Other Reason That Warrants Review by This Court.*

Review of this case would serve no significant purpose. The issue here depends entirely on the application of the specific and unique facts of this case to undisputed, well-established principles of law. The applicable statute of limitations has long since expired on any other similarly situated claims. 30 U.S.C. § 226-2.

Moreover, since the Secretary has already conveyed legal title to the land involved, including subsurface rights, to respondent Arctic Slope Regional Corporation, petitioners' only viable remedy at this point is a claim for damages in the Court of Claims. Petitioners are at this time pursuing that remedy. Thus, review of this case by the Court would serve no significant purpose.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Kevin F. Kelly
WICKWIRE, LEWIS, GOLDMARK & SCHORR
Attorneys for Respondent Arctic Slope Regional Corporation

April 1981